

FILED BY CLERK

MAR 30 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LOURDES M.,)	
)	2 CA-JV 2009-0130
Appellant,)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ARIZONA DEPARTMENT OF)	Rule 28, Rules of Civil
ECONOMIC SECURITY and)	Appellate Procedure
JAZMIN M.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J-15699000

Honorable Kathleen Quigley, Judge Pro Tempore

AFFIRMED

Jacqueline Rohr

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Dawn R. Williams

Tucson
Attorney for Appellee Arizona
Department of Economic Security

ESPINOSA, Presiding Judge.

¶1 Lourdes M. appeals from the juvenile court’s November 2009 order entered following a dependency review hearing, finding that her daughter, Jazmin M., born in June 1998, continued to be a dependent child. Lourdes seems to argue that the Arizona Department of Economic Security (ADES) failed to provide services the court previously had found reasonable to promote visitation between Lourdes and Jazmin and to reunify the family. She contends that, consequently, the finding that Jazmin’s status as a dependent child continued to exist cannot be sustained.

¶2 “On review of an adjudication of dependency, we view the evidence in the light most favorable to sustaining the juvenile court’s findings.” *Willie G. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). The procedural history of this case is undisputed. In February 2008, ADES filed a petition alleging Jazmin and her sister Jessica, born in June 1991, were dependent as to Lourdes and the children’s father, Francisco M.¹ ADES alleged Lourdes verbally abused the children and often forced Jessica to leave the home. As to Francisco, ADES alleged he had not maintained contact with the children and his whereabouts were unknown. The children were adjudicated dependent as to Francisco after he admitted allegations in an amended dependency petition. As to Lourdes, the children were adjudicated dependent after a contested hearing. The court held a dependency review hearing in August 2008, after which it found the children continued to be dependent and did not wish to have contact

¹The dependency proceeding was dismissed as to Jessica in June 2009, after Jessica reached the age of majority.

with their mother. The court ordered ADES would have discretion to allow visitation between the children and their mother, provided it was recommended by the children's therapist. The court also found at that time that ADES had made reasonable efforts to reunify the family and agreed with the case plan to transition the children into Francisco's home and assist Jessica in living independently.

¶3 The juvenile court's minute entry following the November 2008 dependency review reflects Lourdes's argument that ADES had not made reasonable efforts to reunify the family because she had not been permitted visitation of any kind, including therapeutic visitation. The court further noted in its minute entry that ADES had responded to Lourdes's argument by asserting it was "waiting for a therapeutic recommendation from the bonding and attachment therapist before therapeutic visitation with the mother" could be arranged. The court added that the children did not want to have contact with their mother and that the court was "unwilling to force the minors" to do so. The minute entry further provides ADES had explained it was waiting for input from the children's therapist. The court found ADES continued to provide reasonable reunification services, but directed the caseworker to talk to the children's therapist "to request that the minors focus on the possibility" of therapeutic visitation with their mother.

¶4 After another dependency review hearing in February 2009, the court pointed out ADES had arranged a therapeutic visitation with Lourdes and Jazmin but that Jazmin "did not enjoy [it]." Jazmin was then placed with her father. In June 2009, the

court again found ADES had made reasonable efforts to reunify the family. The court continued Jazmin's placement with Francisco, and ordered ADES to continue providing services to Lourdes "and appropriate visitation as therapeutically recommended." Because Jessica reached the age of majority, the dependency as to her was dismissed.

¶5 In June and July of 2009, the juvenile court held a two-day visitation hearing. The court made thorough factual findings in its order after the hearing. The court found, inter alia, Jazmin had terminated individual therapy after a year and refused to attend visits with Lourdes at that time, but that she "might consider visitation with Mother in the future." The court further found Jazmin's therapist had "not recommended forcing Jazmin to have contact with her mother." The court found Lourdes's reliance on *Michael M. v. Arizona Department of Economic Security*, 202 Ariz. 198, 42 P.3d 1163 (App. 2002), unhelpful because, even though the court and the ADES caseworker had "always encouraged and offered therapeutic visitation," Jazmin did not want to visit her mother, and "forced visitation [was] not supported by the therapist." The court found, too, that ADES had "made repeated and reasonable efforts to arrange or encourage therapeutic visitation." Lourdes did not seek appellate review of this order, which was final and appealable, see *In re Maricopa County Juv. Action No. JD-5312*, 178 Ariz. 372, 374, 873 P.2d 710, 712 (App. 1994), just as she had not sought review of the court's preceding orders.

¶6 After a dependency review hearing in November 2009, the court found Jazmin was still dependent. The court confirmed Jazmin's placement with her father.

The court found the services ADES was providing were “appropriate and necessary.” Lourdes has appealed that ruling.

¶7 At the outset, ADES contends, essentially, that there is nothing for this court to address in the appeal from the November 2009 order because that order did not relate to Lourdes’s visitation, which is the gravamen of her appeal. ADES contends that the visitation order had been set forth in the July 16, 2009 order, which Lourdes did not appeal.

¶8 We agree that the previous orders, entered after each dependency review, were appealable, *see In re Yavapai County Juv. Action No. J-8545*, 140 Ariz. 10, 14, 680 P.2d 146, 150 (1984), as was the July 2009 order, *see Maricopa County Action No. JD-5312*, 178 Ariz. at 374, 873 P.2d at 712. And because Lourdes did not challenge those orders, the doctrine of collateral estoppel prevents her from challenging the propriety of findings that were essential to those orders, including the finding that ADES had been making reasonable, diligent efforts to reunify the family up to the date of those orders. *See generally Garcia v. Gen. Motors Corp.*, 195 Ariz. 510, ¶ 9, 990 P.2d 1069, 1073 (App. 1999). Nevertheless, we can and do address the specific challenge Lourdes now raises: “Can a finding that a Dependency continues to exist, if the court has failed to have the Department implement the very services that the court has identified as appropriate and necessary to fulfill the case plan goals, be affirmed?”

¶9 The order from which this appeal is taken resulted from a new finding of continued dependency and is clearly appealable. *See Yavapai County Action No. J-8545*,

140 Ariz. at 14, 680 P.2d at 150. The record, including the court’s minute entry and the transcript from the dependency review hearing, reflects that the issue of visitation was among the issues addressed. The issue of visitation was intertwined with the court’s finding that the services “outlined in the case plan are appropriate and necessary.”

¶10 As we understand it, Lourdes’s argument seems to be that ADES did not implement the services it had told the court it would provide in order to facilitate visitation between Lourdes and Jazmin. Citing no authority, Lourdes asserts that, because ADES failed to “implement[]” those approved services, this court should remand this matter to the juvenile court with directions to “hold [ADES] in contempt of court and cause the Dependency to be dismissed.”

¶11 We review for an abuse of discretion a juvenile court order entered after a dependency review hearing. *See In re Pima County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987). A dependent child is a child who is adjudicated to be “[i]n need of proper and effective parental care and control and . . . [who] has no parent or guardian willing to exercise or capable of exercising such care and control,” or “[a] child whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent.” A.R.S. § 8-201(13)(a)(i) and (iii). “We will not disturb the juvenile court’s ruling in a dependency action unless the findings upon which it is based are clearly erroneous and there is no reasonable evidence supporting them.” *In re Pima County Juv. Action No. 118537*, 185 Ariz. 77, 79, 912 P.2d 1306, 1308 (App. 1994). A preponderance of the evidence must establish a child is dependent. *See id.*; Ariz. R. P.

Juv. Ct. 55(C). In reviewing the court's order, we review the evidence in the light that is most favorable to upholding it. *See Maricopa County No. JD-5312*, 178 Ariz. at 376, 873 P.2d at 714. The "primary consideration in a dependency case is always the best interest of the child." *Ariz. Dep't of Econ. Sec. v. Superior Ct.*, 178 Ariz. 236, 239, 871 P.2d 1172, 1175 (App. 1994). Whether it was in Jazmin's best interest to compel her to visit with her mother under the circumstances of this case was for the juvenile court to determine in the exercise of its discretion. *Cf. Antonio P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 402, ¶ 8, 187 P.3d 1115, 1117 (App. 2008) (juvenile court has broad discretion in determining proper placement of dependent child).

¶12 At the beginning of the dependency review hearing, counsel for ADES explained that ADES was encouraged by the fact that Jazmin and Lourdes had corresponded and that "the case manager continues to encourage both mom and Jazmin to build on that contact" and continues to encourage them to develop the relationship. Counsel for Lourdes then stated that there had been "no in-person therapeutic visitation occurring between the mother and the child" and argued, as he apparently had in previous hearings, that Lourdes's rights continued to be violated by the fact that she was not permitted to see her child. The juvenile court then praised Lourdes for sending Jazmin's belongings to her, stating: "I think that's what opened the door here[,] and Jazmin is probably hopefully going to be more amenable to having visitation in the future." The parties then discussed with the court bringing Jazmin from her home in Chandler to

Tucson for the next hearing, at which time counsel for Lourdes asked the court if it would be possible to arrange “a therapeutic visit” while she was in Tucson.

¶13 The court noted Jazmin was not in therapy at that time, a fact both the caseworker and Jazmin’s counsel confirmed. The court then stated: “If Jazmin is open to . . . visitation when she’s down in Tucson, I think that would be a great step even if it w[ere] in the court house in a neutral location so if we could arrange that and if Jazmin is open to it” Lourdes’s counsel then responded: “I think there is still an outstanding court order.” Counsel added: “I believe it was entered February 29th of this year for the minor to be working with a therapist towards visitation and if she’s not even in therapy, I think that’s a continuing violation of that court order.” The court then commented that Jazmin voluntarily had stopped going to therapy. The court asked the case manager to ask Jazmin if she would begin therapy again. ADES then asked the court how it should proceed if Jazmin still refused. The court responded: “I frankly agree with the testimony that we received before, that I don’t think we can force her into therapy at this point, but I certainly think we can keep asking and offering it to her and to her father and try to encourage that . . . if it’s necessary.” The court added: “And I think it might be a good idea to work towards visitation with mom so [Jazmin] can establish some kind of a relationship with her mother. Whatever that works out to be. But at this point, I’m not willing to force her into it.”

¶14 After the dependency review hearing, the juvenile court found Lourdes and Francisco were in compliance with the case plan and that the goal was to return Jazmin to

Francisco, with whom she was already living. The court found “the services outlined in the case plan are appropriate and necessary.” The court ordered the legal care, custody, and control of Jazmin was to remain with ADES and that Jazmin was to remain physically with her father. The record amply supports the court’s order. It establishes that throughout the dependency, the court urged ADES to do what it could to encourage Jazmin to participate in visitation with Lourdes. But it was clear Jazmin did not wish to visit her mother, a fact the juvenile court considered in entering the previous, unchallenged orders.

¶15 ADES provided Jazmin with therapy and therapeutic visitation and appears to have encouraged her to visit her mother. But, as the court noted in the unchallenged July 2009 order, the child’s counselor had not recommended forcing then eleven-year-old Jazmin to visit her mother. Thus, contrary to Lourdes’s assertion, ADES did not fail to follow the court’s directive of providing services designed to facilitate visitation between Lourdes and Jazmin. The effort to do so simply was not successful. That does not negate the court’s finding that ADES had provided reasonable services in a diligent effort to reunify Lourdes and Jazmin. And, even assuming *arguendo* ADES did not comply with the court’s orders, such noncompliance does not negate the finding that Jazmin is a dependent child. Nor has Lourdes persuaded us that the proper remedy would be dismissal of the dependency proceeding in any event.

¶16 We reject Lourdes’s argument the court failed to require ADES to “implement the very services that the court ha[d] identified as appropriate and necessary

to fulfill the case plan goal.” Rather, even though the court had approved individual therapy for Jazmin as part of the initial case plan, and ADES had provided the child with therapy, she no longer wished to participate in therapy or visitation with her mother. The court simply concluded, as it had in previous, unchallenged orders, that it would not be in Jazmin’s best interest to force her to go to therapy or visit her mother. ADES and the court encouraged Jazmin to visit her mother and continued to do so at the dependency review hearing that gave rise to this appeal. The court directed the caseworker to discuss with Jazmin resuming counseling and visitation after the November hearing. Consequently, there is no need for us to remand this matter to the juvenile court “with a mandate that the services be implemented,” as Lourdes requests. Nor is there any basis for granting her request to direct the juvenile court to hold ADES in contempt of court and dismiss the dependency proceeding if it does not implement these services.

¶17 Finally, Lourdes cites *Michael M.* and *Maricopa County No. JD-5312* for the proposition that a parent should only be denied visitation under extraordinary circumstances. She contends no such circumstances exist here. But both cases make clear that, although “not wholly unfettered,” *Michael M.*, 202 Ariz. 198, ¶ 11, 42 P.3d at 1166, ultimately the issue of visitation is for the juvenile court to address in the exercise of its discretion. See *Maricopa County No. JD-5312*, 178 Ariz. at 375-76, 873 P.2d at 713-14. On this record, we cannot conclude the juvenile court abused its discretion. The court and ADES have encouraged visitation and the court considered previously introduced evidence, including the testimony of Jazmin’s therapist. The court balanced

the various rights and interests at issue here, and concluded it would not be in Jazmin's best interest to force her to visit her mother, a finding the court previously had made based on information and a recommendation from the child's former therapist and which Lourdes did not challenge.² The court's reiteration of that conclusion in the most recent dependency review was not an abuse of discretion.

¶18 For the reasons stated, the juvenile court's November 2009 order is affirmed.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

²We note that the record includes the December 2008 addendum to a previous progress report prepared by a Child Protective Services case worker. The case worker reported that Jazmin's therapist had explained why Jazmin did not want to visit her mother and that the therapist did not recommend that Jazmin visit her mother at that time. Additional portions of the record, including a February 2009 progress report, make clear that Jazmin continued to receive therapy and that a therapeutic visit was to take place thereafter.